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IN THE

Supreme Court of the United States

October Term, 1970
No. 812

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, *et al.*

Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest and Points and Authorities in Support Thereof, and Order Thereon.

COMES NOW the Fort Mojave Tribe of Indians, by Raymond C. Simpson, Tribal Attorney, at the discretion and the authority of the Tribal Council and without entering their appearance as a party, moves the Court for leave to file their Suggestions of Interest and Points and Authorities in Support Thereof.

Dated: April 8, 1971.

RAYMOND C. SIMPSON,
Tribal Attorney for Fort Mojave Tribe of Indians.

IN THE

Supreme Court of the United States

October Term, 1970
No. 812

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, *et al.*

Order on Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest and Points and Authorities in Support Thereof.

Based upon the foregoing motion, and good cause appearing therefore, It Is Ordered that the Fort Mojave Tribe of Indians' motion for leave to file a Suggestion of Interest and Points and Authorities in support thereof is granted.

Dated: This .... day of ....., 1971.

.....

UNITED STATES SUPREME COURT JUDGE.

IN THE

Supreme Court of the United States

October Term, 1970
No. 812

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, *et al.*

Suggestion of Interest of the Fort Mojave Tribe of Indians and Points and Authorities in Support Thereof.

Comes Now the Fort Mojave Tribe of Indians by Raymond C. Simpson, Tribal Attorney, under the direction and by the authority of their Tribal Council, without submitting to the jurisdiction of the Court, and appearing specially, solely and only for the purpose of suggesting to this Honorable Court that said Indian Tribe has a direct, immediate, and vital interest in the subject matter of the above-entitled action and that they are indispensable parties thereto by reason of the following:

1. **Prior Adjudication of the Right to Water by the Fort Mojave Tribe of Indians Clearly Established Their Interest in the Subject Matter of the Case at Bar.**

This Honorable Court in *Arizona v. California,* 373 U.S. 546, 83 S. Ct. 1468 decreed that the Fort Mojave Tribe has clear and definite legal rights to use

the water from the mainstream of the Colorado River when they said:

> "We also agreed with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."

These legal rights to the use of said water accords to them an entitlement of approximately 122,640 acre feet of water annually. At least seventy per cent (70%) of the water flowing to the Fort Mojave Indian Reservation from the mainstream of the Colorado River originates in the State of Colorado. A very substantial part of that water, so essential to the implementation of the portion of the Court's decree in *Arizona v. California, supra,* regarding the Fort Mojave Indians, is the Eagle River. Without this source of water supply, the water rights of the Mojaves would, of course, become vacuous since the entitlement of the Mojaves to water from the mainstream of the Colorado River is totally dependent upon the water supplied by its tributaries. As a consequence, any reduction of water in the Colorado River by reason of Eagle River (tributary) use clearly creates an intolerable plight for the Fort Mojave Indians because such upstream use will materially reduce the quantities of water entering the mainstream of the Colorado River which would otherwise flow to the Fort Mojave Indian Reservation. This is particularly significant since it is a matter of indisputable record that the Colorado River has been most seriously over-appropriated. In fact, it is also a matter

of record that current water yields reaching the Fort Mojave Indian Reservation are falling far short of the anticipated flows when the River was originally apportioned between the Upper and Lower Basins of the Colorado.

Examination of the Map of the Colorado River Basin appended hereto as Appendix A, and by reference made a part hereof, graphically illustrates the flow of the tributaries into the mainstream of the Colorado River and its flow into and through the Fort Mojave Reservation.

It is, of course, elemental that the said decreed rights to the use of water by the Fort Mojave Indian Tribe in the mainstream of the Colorado River and its tributaries are interests in real property of the highest dignity. Those rights, as asserted above, although in the mainstream of the Colorado River, in order to be meaningful, must extend to the sources of that water, *i.e.*, the tributaries of that stream such as the Eagle River. It is this fundamental property interest of the Fort Mojave Indians that causes them to have a direct, immediate, and vital interest in the subject matter of the above-entitled case plus making them an indispensable party thereto. Any other conclusion has been carefully characterized by William H. Veeder, attorney at law and well-known Conservation Specialist for the Bureau of Indian Affairs, in his special Report to the Commissioner of Indian Affairs entitled "Conflicts of Interest In Proceedings Before the Supreme Court of the United States", as "A Preface To Disaster For The American Indian People." A true and correct copy of said Report was Appendix B in our filing in Eagle River Case No. 87 which we adopt by reference and make a part hereof. Said Report was released on March

23, 1971, and is concerned exclusively with the Eagle River Case No. 87 and Water Division No. 5 Case No. 812.

2. The Fort Mojave Tribe and Other Tribes Similarly Situated Will Be Irreparably Damaged if Their Rights to the Use of Water Are to Be Henceforth Adjudicated in State Courts.

On March 24, 1971, one day after release of the said Veeder Report, this Honorable Court rendered a decision in the Water Division No. 5, declaring that Section 666 of Title 43 of the United States Code is an all-inclusive statutory provision that subjects to general adjudication in state proceedings, all rights of the United States to water within a particular state's jurisdiction, regardless of how they were acquired. Therein specific reference was made to this Court's decree in *Arizona v. California, supra,* with the Court expressly stating that "In *Arizona v. California* we were primarily concerned with Indian reservations." Nevertheless, at no place in the decision pertaining to Water Division No. 5 is there any distinction drawn between the entitlement of the United States and the Indian entitlement vested in the United States as trustee thereof, the latter being "private" as opposed to public in character. The Indian rights are distinct and separate from those rights claimed and administered by the agencies of the Forest Service and the Bureau of Land Management alluded to in the said Eagle River case. In other words, it is submitted that there has been a shocking failure by the United States as trustee for the Indians, to distinguish or to indeed even make any reference to the private rights of the Fort Mojave Indians, or any other Indians similarly situated, in the Water Division No. 5 case. The validity of this conclusion

is completely and forcefully documented in our Appendix B.

This failure is all pervasive, and is exemplified by a quotation from the Petition of Certiorari in Water Division No. 5 Case 812 (companion case to Eagle River Case No. 87). Therein it was stated:

> "Reserved rights (of the United States) have been defined by this Court as the entitlement of the United States to use as much water from sources on land withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to the water rights vested as of the date of the withdrawal. *Arizona v. California,* 373 U.S. 546, 596-601." *Petition for Writ of Certiorari**. Case No. 87 on page 3.*

The paraphrasing of the decision of *Arizona v. California, supra,* as last cited, is truly critical to the Fort Mojave Tribe because most assuredly the Mojave rights are not an "entitlement of the United States to use**" water. Rather, the citation, when considered in context, revealed the Mojaves and other Indians similarly situated have rights to the use of water which have been recognized and distinguished from those of the United States for public purposes.

Again failure to establish the all important difference between the "private" rights of the Indians, held in trust for them by the United States, from those of the Federal Government, held for the public as a whole, is found in this statement from the brief filed with the Supreme Court:

> "As indiciated previously** the United States unquestionably has the right to use as much water

> from sources on lands withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn**".

Not only is the statement incorrect, but it should be noted that the cases cited in the brief to support the contention relates exclusively to Indian rights as opposed to public rights. These cases are found in the brief for the United States, Case No. 87 on page 10, all of which underscores the imperative need to distinguish the Indian rights from those of the public.

In keeping with the tone and temper of said erroneous excerpt quoted from the Petition of Certiorari and the briefs filed in Case No. 87 is still another excerpt taken from the Petition and paraphrased in the brief to the effect that: "The magnitude of the problem is indicated by the fact that about four hundred forty-three million acres have been withdrawn from the Public Domain for use as Indian reservations, national parks, national forest, national recreation areas, national monuments, etc." Petition for Certiorari** on pages 10-11. Failure to separate and distinguish the real property rights of the American Indians from the public rights evidences the unfair and incorrect position which the United States has presented to the Supreme Court in regard to the private interests of the Indian which is potently spelled out and detailed in said Appendix B. From the legal standpoint this presents an intolerable situation for the Fort Mojave Indian Tribe and for all other American Indians whose rights to use of water are in effect intermingled with the "reserve" rights of the United States to the use of water for the public at large.

It is respectfully submitted that perhaps a fatal blow to the Indian interests was, we believe, inadvertently

delivered by Justice Douglas when he also failed to distinguish the Indian real property interests in his decision of March 24, 1971, in the Water Division No. 5, Case 812. Therein he stated:

> "As we said in *Arizona v. California,* 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' Id., at 597. The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian Reservations. Id., 598-601. The reservation of waters may be only implied and their amount will reflect the nature of the federal enclave. Id., 600-601."

It cannot be denied that this quoted statement of Justice Douglas fails to distinguish the private Indian rights involved from the public rights of the United States. It must also be admitted that one can reasonably conclude therefrom that the private Indian rights will henceforth be governed by this Court's holding therein that state courts have jurisdiction to adjudicate the reserved water rights of the United States. Furthermore it should be observed that this court made its decision herein without distinguishing the Indian rights despite a clear declaration by the Congress of the United States that no state shall have jurisdiction "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of" property still held in trust by the United States for Indians, and that Congress expressly included water rights therein. Public Law 280 (67 Stat. 589, 28 U.S.C. Sec. 1360(b)).

The gravest consequence to the Fort Mojave Tribe of Indians will necessarily ensue by the failure of the pe-

titions for certiorari and the brief in Water Division No. 5 Case No. 812 to point out to the Supreme Court that the waiver of sovereign immunity from suit under 43 U.S.C. 666 does not in any way pertain to Indian rights nor to their use of water. It is basic law that unless the Indian immunity from suit is specifically waived by the Congress that immunity is unimpaired. From the language of 43 U.S.C. 666, it is manifestly clear that the Congress did not intend to include the rights of the American Indians within the scope of that waiver. If construction of the Act were permissible, which is denied, the legislative history would result in the rejection of any concept as to the applicability of the Act to the Indian rights and interests. This failure to distinguish the Indian rights from the public rights of the United States government could therefore result in subjecting the rights of the American Indians to adjudication thereof under the laws of the states. Because the state laws governing the rights of the use of water are frequently incompatible with the laws governing the Indian rights to the use of water, the extreme prejudice to the Indian rights becomes patently clear. In short, the repeated failure of the Federal government, as trustee for the Indians, to bring to the Supreme Court's attention the significant disparity between the laws governing Indian rights and the laws governing the public rights of the United States, could result in serious impairment or extinguishment of the Indian rights. Thus, failure to clarify this Water Division No. 5 Case No. 812 sufficiently mud-

dies the waters so that it is not an over statement to declare that the Indian real property rights, to a large extent, might be seriously infringed upon or completely extinguished.

Wherefore, the Fort Mojave Tribe of Indians respectfully represent:

I.

That the Fort Mojave Tribe of Indians is a necessary and indispensable party to this action but they cannot be made parties thereto since Congressional consent therefore has not been granted, and no order, judgment or other action of this court could or would be effective against the Fort Mojave Tribe of Indians or any other Indians similarly situated.

II.

That this Court is without jurisdiction in the premises, and that this Court's decision of March 24, 1971, in Water Division No. 5, Case No. 812, should therefore be vacated and a dismissal of the action ordered *sua sponte* due to lack of jurisdiction.

RAYMOND C. SIMPSON,
Tribal Attorney.

MEMORANDUM OF POINTS AND AUTHORITIES.

In the early landmark case of *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 515, Chief Justice Marshall declared in unequivocal language that Indian tribes are distinct political entities with the right of self-government, having exclusive authority within their territorial boundaries and that they are not subject to the laws of the states in which they might be located. The broad principles of the said *Worcester* decision have been adhered to by the courts ever since, and were reaffirmed by this Honorable Court as late as *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269.

The Fort Mojave Indian Reservation is geographically located in the States of Arizona, California, and Nevada with the mainstream of the Colorado River running directly through it. All three of said States have from time to time attempted to impose their laws upon the Fort Mojave Tribe of Indians who, in turn, have resisted by relying upon their legal rights as described in the *Worcester* case. In 1953 the picture of state encroachment was displayed before the Congress of the United States with the accompanying argument that "law and order" required that the respective states be granted a limited jurisdiction. Congress agreed and proceeded to pass Public Law 280 (28 U.S.C. 1360) for that limited purpose, but was emphatic in Section 1360(b) thereof that real property rights, including land and water, still held in trust by the United States for the benefit of Indians, did not become subject to the jurisdiction of any state or its political subdivisions. Hence, when this Court, in rendering its decision in Water Division No. 5, Case No. 812, held that the State of Colorado had jurisdiction to adjudicate the

reserved rights of the United States, it was acting contrary to Congressional mandate unless it is made clear that said decision is in no way applicable to the privately owned property rights of the Indians, held in trust by the United States.

I.

A Suggestion of Interest is the accepted method of bringing to the attention of the Court the interest of an entity such as an Indian tribe in the subject matter of a suit, and the Court's lack of jurisdiction of any suit designed to circumscribe, limit and affect such an entity in the use and enjoyment of its property or property rights.

Calnevari Corporation v. River Farms, Inc., No. 62-361-K Civil, United States District Court, So. Dist. of Calif., Central Division (1965);

Stanley v. Schwalby, 147 U.S. 508 (1893);

Florida v. Georgia, 58 U.S. 478 (1854);

Calhoun County, Fla. v. Roberts, 137 F. 2d 130 (C.A. 5, 1943);

Booth v. Fletcher, 101 F. 2d 676, 101 F. 2d 676 (C.A. D.C. 1939).

Barron & Holtzoff (Wright); Federal Practice and Procedure Section 352.

II.

A suggestion of interest by the Fort Mojave Tribe of Indians showing an interest in water rights by way of reference to a decree of this Honorable Court granting them specific water rights, or to an Act of Congress prohibiting State adjudication thereof, should be sufficient to show that they are an indispensable party.

When a question of the District Court's jurisdiction is raised, either by a party or by the Court on its own motion, the Court may inquire by affidavits or otherwise, into the facts as they exist. F.R.C.P. Rule 12(b);

1360(b) Title 28 of the U.S. Code states:

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights,* belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*" (Emphasis ours).

Wetmore v. Rymer, 169 U.S. 115, 120-121;
McNutt v. General Motors Corp., 298 U.S. 178;
KVGS, Inc. v. Associated Press, 299 U.S. 269.

III.

The Indians are indispensable parties in any case involving property in which they have an interest.

Maricopa County v. Valley Bank, 318 U.S. 357 (1943);
United States v. Alabama, 313 U.S. 274 (1941);
Minnesota v. United States, 305 U.S. 382 (1939);
Arizona v. California, 298 U.S. 558 (1936).

IV.

The title or property interest of the Fort Mojave Indian Tribe is put in issue when an Indian Tribe claims an interest.

Louisiana v. Garfield, 211 U.S. 70;
Stanley v. Schwalby, 162 U.S. 255;
Oregon v. Hitchcock, 202 U.S. 60;
Goldberg v. Daniels, 231 U.S. 218;

V.

Indian Tribes under the tutelage of the United States are not subject to suit without the consent of Congress, and Congress alone can authorize such a suit.

Thebo v. Choctaw Tribe of Indians, 66 Fed. 372 (1895)

wherein the Court said:

"It may be conceded that it would be competent for Congress to authorize suit to be brought against the Choctaw Nation upon any and all the causes of action in any court it might designate. Acts of Congress have been passed, specially conferring on the courts therein named jurisdiction over all controversies arising between the railroad companies authorized to construct their roads through the Indian Territory and the Choctaw Nation and the other nations and tribes of Indians owning lands in the territory through which the railroads might be constructed. Other acts have been passed authorizing suits to be brought by or against these Indian Nations in the Indian Territory to settle controversies between them and the United States and between themselves.

Among such acts are the following: 'An act for the ascertainment of amount due the Choctaw

Nation.' 21 Stat. 504. Act of July 4, 1884 (23 Stat. 73), granting the right of way through the Indian Territory to the Southern Kansas Railway Company. An act granting right of way through Indian Territory to Kansas & Arkansas Valley Railway Company, 24 Stat. 73. An act granting the right of way through the Indian Territory to the Kansas City, Ft. Scott & Gulf Railway Company. Id. 124. An act granting the right of way through Indian Territory to Ft. Worth & Denver City Railway Company. Id. 419. An act granting the right of way through Indian Territory to the Chicago, Kansas & Nebraska Railway Company, Id. 446. An action granting right of way through the Indian Territory to the Choctaw Coal & Railway Company. 25 Stat. 35. An act granting the right of way to the Ft. Smith & El Paso Railway Company through the Indian Territory. Id. 162. An act granting the right of way to Kansas City & Pacific Railway Company through Indian Territory. Id. 140. An act granting the right of way to Paris, Choctaw & Little Rock Railway Company through the Indian Territory. Id. 205. An act granting right of way to Ft. Smith, Paris & Dardanelle Railway Company through Indian Territory. Id. 745. An act to authorize the Kansas & Arkansas Valley Railway Company to construct an additional railroad through the Indian Territory. 26 Stat. 783.

The constitutional competency of Congress to pass such acts has never been questioned, but no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act

of congress expressly conferring the jurisdiction in the particular case (pp. 373-374).

Being a domestic and dependent state, the United States may authorize suit to be brought against it. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. 'It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it may if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state.' *Beers v. Arkansas,* 20 How. 527. The United States has waived its privilege in this regard, and allowed suits to be brought against it in a few specified cases. Some of the states of the Union have at times claimed no immunity from suits, but experience soon demonstrated this to be an unwise and extremely injurious policy, and most, if not all of the states after a brief experience, abandoned it, and refused to submit themselves to the coercive process of judicial tribunals.

When the Supreme Court of the United States in *Chisholm v. Georgia,* 2 Dall. 419, decided that under the constitution the court had original jurisdiction of a suit by a citizen of one state against another state, the eleventh amendment to the constitution was straightway adopted, taking away this jurisdiction. Since the adoption of this amendment, the contract of a state 'is substantially without sanction, except that which arises out of the honor and good faith of the state itself; and these are not subject to coercion'. In re Ayers, 123 U.S. 443, 505, 8 Sup. Ct. 164. One claiming to be creditor of a state is remitted to the justice of its legislature. It has been the settled policy of Congress not to sanction suits generally against these Indian Nations or subject them to suits upon contracts or other causes of action at the instance of private parties. In respect to their liability to be sued by individuals, except in the few cases we have mentioned, they have been placed by the United States, substantially, on the plane occupied by the states under the eleventh amendment to the constitution. The civilized Nations in the Indian Territory are probably better guarded against oppression from this source than the states themselves, for the states may consent to be sued, but the United States has never given its permission that these Indian Nations might be sued generally, even with their consent. As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of Congress to confer such a jurisdiction upon any court

would have to be expressed in plain and unambiguous terms (pp. 375-376)."

Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F. 2d 529;

Haile v. Saunooke, 148 Fed. Supp. 604, Aff'd. 246 F. 2d 293, Cert. denied 78 S. Ct. 268 (1957).

VI.

Indian Tribes may not be sued without their consent thereto, and this proceeding should be dismissed *sua sponte* since the Mojave Indians are an indispensable party who were never joined, and who do not consent to be sued.

Turner v. United States, 248 U.S. 354 (1919);

United States v. U.S. Fidelity & Guar. Co., 106 F. 2d 804 (1939), 309 U.S. 506 (1940).

See also:

United States v. McShan v. Sherrill, 283 F. 2d 462 (1960);

Partan, et al., 132 F. 2d 886 (1943), on the status of a tribe;

United States v. Sherwood, 312 U.S. 584 (1941);

United States v. Shaw, 309 U.S. 495 (1940);

Minnesota v. United States, 305 U.S. 382 (1939).

VII.

There can be no waiver of an Indian tribe's immunity fom suit. This proposition of law was quite graphically illustrated in *United States v. United States Fidelity & Guaranty Co.,* 60 S. Ct. 653, at 657, 309 U.S. 506 at 514, wherein the Court said:

"the reasons for the conclusion that this immunity may not be waived govern likewise the ques-

tion of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body."

It is clearly apparent that in the instant case the Fort Mojave Indian Tribe must be deemed an indispensable party; that they have not consented to be sued, and that this Court's decision of March 24, 1971, in the Water Division No. 5, Case No. 812, should therefore be vacated and a dismissal of the action ordered *sua sponte* by reason of lack of jurisdiction.

RAYMOND C. SIMPSON,
Tribal Attorney.

The hereinafter named Indian Tribes represented by Raymond C. Simpson also concur with the Fort Mojave Indian Tribe and do hereby join them in this proceeding on behalf of themselves and all other Indian tribes who may be similarly situated.

The Agua Caliente Band of Mission Indians at Palm Springs, California.

The Cabazon Band of Mission Indians at Indio, California.

The Quechan Indian Tribe at Yuma.